No. 57008-4

(Consolidated with No. 57018-1)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In the Matter of Jack Clearman, A Vulnerable Adult,

Rebecca Clearman,

Respondent,

v.

Alice Jane Clearman and Peter Buck,

Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Rebecca Clearman's response brief ("the Response") tries to avoid the facts of this case and the governing law in several ways.

First, the Response argues that this case was not moot as of the superior court's January 7 and April 26 orders, because it might have still been able to protect unidentified third parties. Response at 47.[1] But a case is moot when the court cannot provide effective relief *to the litigants*, not third parties. *Orwick v. City of Seattle*, 103 Wn.2d 249, 250, 692 P.2d 793 (1984).

Second, to avoid her clear, cogent, and convincing burden of proof, Rebecca ignores the fact that Jack Clearman objected to the relief she requested below. CP0139-141.

Third, Rebecca asks this court to ignore all case law defining undue influence and apply the statutory definition

[1] As with the Opening Brief, this Reply will use first names. No disrespect is intended.

under RCW 74.34. But there is no statutory definition. Undue influence requires evidence that the vulnerable adult's free will has been overcome. There is no evidence that happened here.

Fourth, to construct support for the finding that Alice and Peter engaged in neglect, Rebecca claims that she "insisted" with "desperate pleas" that Alice take Jack to the doctor for a week. This sounds terrible, but it's just not true. On December 1, Rebecca suggested that Jack see a doctor the next day if he remained sleepy, which he did not. On December 2, she asked that Jack's December 6 appointment with his doctor be *cancelled*. On December 4, she suggested that Jack's doctor receive a urine sample on December 6. On December 5, Rebecca saw Jack by Zoom and did not mention any need for him to see a doctor. Alice had Jack taken to a doctor on December 5, within 28 hours of Rebecca first mentioning the possibility of an infection.

Fifth, in claiming that Alice and Peter disregarded a clear and present danger, Rebecca ignores the fact that not one of the

fifteen people who saw Jack in person or by Zoom on December 1-5 (including herself) mentioned seeing any clear and present danger.

The contested orders must be reversed. This action was never the right forum for Rebecca to try her undue influence claim—that is being handled in her ongoing will contest. And this case was moot by January 7—Jack had died, Alice and Peter had no access to his assets, and a professional fiduciary was being appointed for his estate. Additionally, the superior court erred in concluding that Alice and Peter unduly influenced Jack. There is no evidence that either of them told Jack anything deceptive or ever asked or told Jack to change his estate plan. Finally, the Court erred in using hindsight to determine that Alice and Peter committed neglect.

II. REPLY

A. This case was moot before January 7, 2022.

The Response does not deny that the question of mootness is a question of law reviewed *de novo*. *Washington*

State Commc'n Access Project v. Regal Cinemas, Inc., 173 Wn. App. 174, 203–04, 293 P.3d 413 (2013). Nor does Rebecca deny that a ruling made when a case is moot must be vacated. *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 595, 191 P.3d 1282 (2008). Rebecca agrees that "[a] case becomes moot when a court can no longer provide effective relief." Response at 45 (quoting *Gronquist v. Dep't of Corr*., 196 Wn.2d 564, 569, 475 P.3d 497 (2020)).

1. As of January 7, the superior court had no ability to provide effective relief to Rebecca.

Rebecca does not contest the key facts that rendered this case moot before January 7. Jack was deceased. Peter and Alice had no access to Jack's assets and had requested that a professional fiduciary be appointed for Jack's estate. CP0412, 0420; VRP 39:9-14. This action does not include a claim for damages. While Rebecca has been attempting since June 2022 to use the challenged orders from this matter to effect collateral

estoppel in her ongoing TEDRA action to overturn Jack's will,[2] the Response does not argue that her hope of precluding issues in the TEDRA action prevents this action from being moot. *Cf. Harbor Lands*, 146 Wn.App. at 592-594 (a suit's possible preclusive effect in another action does not prevent it from being moot). In sum, nothing in the Response suggests that as of January 7, 2022, the superior court could provide Rebecca with any effective relief.

2. The possibility that an order might assist a third party does not prevent an action from being moot.

The Response argues that this action was not moot because an order under RCW 74.34 could potentially benefit a third party by requiring Peter and Alice to register as abusers. Response Brief at 46-47. The possibility that a lawsuit may provide some benefit to a third party does not prevent the

[2] Kitsap County Superior Court, case no. 22-4-00639-18, June 3, 2022, Petition at 2:16-22.

lawsuit from being moot where the court cannot provide effective relief *to the plaintiff*. *Orwick*, 103 Wn.2d at 253-254.

In *Orwick*, the three plaintiffs received speeding citations from the Seattle Police Department based on radar readings. *Id*. at 250. While awaiting hearings on their petitions to contest the citations, the plaintiffs filed a class action alleging (1) the Seattle Municipal Court's procedures for contesting citations violated RCW 46.63 and (2) speeding citations were being issued as a result of inaccurate radar equipment and inadequately trained officers. *Id*. at 250-251. Before the hearings to contest the citations, each of the plaintiffs' citations was dismissed. *Id*. at 250.

After the citations were dismissed, the superior court dismissed the claims for injunctive and declaratory relief as moot. *Id*. at 252-253. The Court of Appeals and Supreme Court affirmed. *Id*. at 253. Because the plaintiffs' citations had been dismissed, the superior court could not provide the plaintiffs with any further relief from the citations or from the allegedly

faulty procedures for challenging the citations. *Id*. The possibility that third parties (all those in the plaintiffs' proposed class) might benefit if the plaintiffs were allowed to continue pursuing their claims for declaratory and injunctive relief did not prevent those claims from being moot. *Id*.

Here, the hypothetical third-party benefits of this action did not prevent this action from being moot on January 7, 2022. The superior court erred by not dismissing this case as the superior court did in *Orwick*.

3. There is no applicable exception to the mootness doctrine.

The *Orwick* Court noted there is a narrow exception to the mootness doctrine for "matters of continuing and substantial public interest." *Id*. at 253 (citing *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). "However, the moot cases which this court has reviewed in the past have been cases which became moot only after a hearing on the merits of the claim." *Id*. (citing *In re Cross*, 99 Wash.2d 373, 377, 662 P.2d 828 (1983); *In re Bowman*, 94 Wn.2d 407, 409-10, 617 P.2d

731 (1980); *In re Patterson*, 90 Wn.2d 144, 145, 579 P.2d 1335 (1978); *Northwest Trollers Ass'n v. Moos*, 89 Wn.2d 1, 2, 568 P.2d 793 (1977); *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 177, 532 P.2d 614 (1975); *Sorenson*, 80 Wn.2d at 558.) In those cases, issues of public import that were likely to recur had been fully litigated by parties with a stake in the outcome of a live controversy before they became moot. *Id*. at 253. In *Orwick*, however, the claims for declaratory and injunctive relief became moot before trial, so it was not appropriate to apply the public interest exception to the mootness doctrine. *Id*. at 253-254.

As in *Orwick*, this case became moot before the perfunctory January 7, 2022, hearing. Hence, even if the Response had explicitly attempted to invoke the public interest exception to the mootness doctrine, this case would not be a candidate for that exception.

If this case had gone through a trial on the merits and only become moot afterward, the public interest exception still

would not apply. The three "essential" factors for application of the public interest exception are:

> (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.

Harbor Lands, 146 Wn. App. at 594 (citing *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)). Those factors all weigh against the public interest exception here. This is a private dispute. This suit will not lead to any guidance of public officers. And there is no evidence of a likely recurrence of any alleged conduct.[3]

4. RCW 74.34.210 did not prevent this case from being dismissed as moot.

The Response argues that this case was not moot because RCW 74.34.210 "does not say" that "an action for damages" is "the only reason for continuing jurisdiction" after a vulnerable

[3] Alice does not have another parent she will spend six years caring for only to have her siblings hurl accusations at her at the end of the parent's life in pursuit of a greater inheritance.

adult's death. Response at 46. From the supposed lack of an express limitation, Rebecca reasons that the statute allows post-death jurisdiction in every action, even if the petitioner cannot obtain any effective relief. *Id*.

Rebecca's reading of RCW 74.34.210 is not only at odds with the mootness doctrine, but also the language of the statute itself. The statute defines "interested persons" for the purpose of actions under RCW 74.34, and that definition does not include third parties. RCW 74.34.020(11).[4] The statute provides that an action may only be initiated "*on behalf of the vulnerable adult*," not on behalf of third parties. RCW 74.34.110(1). A court may order relief "it deems necessary *for the protection of the vulnerable adult*," not relief necessary to protect third parties. RCW 74.34.130.

Rebecca's interpretation of RCW 74.34.210 relies on reading the first sentence of the following passage in isolation:

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[4] All discussion of RCW 74.34 will focus on the statute as it existed before July 1, 2022. *See* Appx. 129-147.

> The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries…or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate.

RCW 74.34.210(emphasis added). Rebecca's reading of this passage is incorrect because a single sentence from a section of a statute should never be read in isolation. *Cramer v. Van Parys*, 7 Wn. App. 584, 586, 500 P.2d 1255 (1972) ("the words of a statute must be…read in context" and "construed to give effect to all the language used.")(internal citations omitted).

When Section .210 is read as a whole, it plainly provides that a court has continuing jurisdiction after a vulnerable adult's death *for the purpose of damages claims brought or maintained by the personal representative of the estate of the deceased vulnerable adult*. Additionally, even if the words "death…shall not deprive the court of jurisdiction" were read in isolation, the

mootness doctrine would still apply. Hence, even if a vulnerable adult's death alone does not automatically end a court's jurisdiction, a court's inability to provide effective relief to the petitioner after death would still make the case moot.

The superior court had no continuing jurisdiction after Jack's death. Rebecca did not bring a damages claim and could not have Jack did not reside in a licensed facility and Alice and Peter are not licensed caretakers. RCW 74.34.200(limiting possible defendants in damages claims). Rebecca did not petition for the right to maintain the cation after Jack's death, nor was she the estate's personal representative. *See Matter of Est. of Titus*, 14 Wn. App. 2d 1032, n.8, 2020 WL 5511331, *5 (2020)(unpublished)(Section .210 leaves the decision of whether to maintain an action post-death "to the discretion of the estate's personal representative.").[5] The superior court's

[5] All unpublished cases cited herein are identified and are cited for their persuasive authority, per CR 14(a).

January 7 and April 26, 2022, orders were entered when the case was moot and must therefore be vacated.

B. Rebecca's burden of proof was clear, cogent, and convincing evidence.

Below, Rebecca acknowledged that "[t]he standard for the Court to apply is clear, cogent, and convincing evidence." VRP 13:1, 8. The superior court did as well. CO0807 at COL 1. Rebecca and the superior court were correct. The clear, cogent, and convincing standard applies where a vulnerable adult objects in an action under RCW 74.34, as Jack Clearman did. *In re Knight*, 178 Wn. App. 929, 937, 940, 317 P.3d 1058 (2014); CP0139-0141. The Response ignores these facts in an effort to avoid the heightened burdened of proof. But this Court cannot ignore facts and must review the contested orders considering the clear, cogent, and convincing standard.

C. The Response misstates the law defining undue influence.

1. Undue influence is *not* defined by statute.

Footnote 57 of the Response says "the Act [RCW 74.34] defines undue influence in this context." Response at 29. But the Response does not say where or what that definition is. The phrase "undue influence" appears five times in former RCW 74.34. *See* RCW 74.34.020(2)(d), (7), and (12)(definitions of "personal exploitation," "financial exploitation," and "Interested person") and sections .135(1 and 2)(describing procedures for a statutory action).

Section .020(2)(d) defines "Personal exploitation" as

> an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

While "undue influence" is used in this definition, it is not itself defined. But this appears to be the provision Rebecca is treating as the definition of undue influence.

The Response is written as if all that is necessary for a finding of "undue influence" is a showing that the behavior of the vulnerable adult changed. Response at 27. The Response goes so far as to say it is "irrelevant" under RCW 74.34 that there is no evidence of Alice or Peter ever discussing Jack's estate plan with him. Response at 30. As long as he changed his plan, the argument goes, there was undue influence. *Id*. Rebecca's reading of the statute is plainly incorrect as it would automatically convert every change of behavior by a vulnerable adult into a case of actionable undue influence.

As there is no definition of undue influence in RCW 74.34, this Court may look for a definition of that term in another statute on the same subject. *State v. M.Y.G.*, 199 Wn.2d 528, 532, 509 P.3d 818, 819 (2022)(citing *Champion v. Shoreline Sch. Dist. No. 412*, 81 Wn.2d 672, 676, 504 P.2d 304 (1972); *State ex rel. Am. Piano Co. v. Superior Court*, 105 Wash. 676, 679, 178 P. 827 (1919)). However, the only Washington statute to define "undue influence" is RCW

66.28.285, which deals with undue influence among merchants in the retail market for alcoholic beverages. Hence, there is no relevant statutory definition of undue influence.

2. Undue influence is that which destroys free will through force, fear, or constraint.

In the absence of a statutory definition of a term

> courts may resort to the applicable dictionary definition to determine a word's plain and ordinary meaning unless a contrary intent within the statute appears.

State v. M.Y.G., 199 Wn.2d at 532 (citing *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991); *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wn.2d 232, 244, 662 P.2d 38 (1983)). The dictionary definition of "undue influence" is "such influence over another often presumed from the existence of very close relationships as destroys [their] free agency in the eye of the law." *Yaron v. Conley*, 17 Wn. App. 2d 815, 826-27, 488 P.3d 855, 861 (2021)(*citing* Webster's Third New International Dictionary 2492 (2002)). This dictionary definition aligns with

the definition of "undue influence" developed in Washington case law.

Undue influence is that which, at the time of the testamentary or other relevant act, "interfered with the free will of the testator and prevented the exercise of judgment and choice." *In re Melter*, 167 Wn. App. 285, 306, 273 P.3d 991 (2012)(*quoting In re Riley's Estate*, 78 Wn.2d 623, 646, 479 P.2d 1 (1970)). Undue influence is "tantamount to force or fear which destroys the testator's free agency and constrains him to do what is against his will." *Id*. at 306-307 (*quoting In re Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998)). Mere advice, arguments, persuasions, solicitations, suggestions, or entreaties are not undue influence unless they "effectively subdue and subordinate the will of the testator and take away his or her freedom of action." *Id.* at 307 (citing *In re Estate of Marks*, 91 Wn. App. 325, 333, 957 P.2d 235, *review denied*, 136 Wn.2d 1031, 972 P.2d 466 (1998)).

After claiming that RCW 74.34 defines undue influence, the Response characterizes the Opening Brief's discussion of undue influence case law as "unhelpful" and an "irrelevant excursion." Response at 29, fn. 57. The Court of Appeals disagrees, as three unpublished opinions in cases brought under RCW 74.34 have turned to will contest case law to determine the meaning of undue influence. *In re Est. of Johnson*, 4 Wn. App. 2d 1038, 2018 WL 3344944 (2018); *Matter of Guardianship of Horst*, 20 Wn. App. 2d 1050, 2022 WL 167494 (2022); *Matter of Est. of Besola*, 22 Wn. App. 2d 1041, 2022 WL 2467468 (2022). Even Rebecca does not seem to buy her own argument that undue influence case law is irrelevant. The Response cites an undue influence case that has nothing to do with RCW 74.34 to argue, incorrectly, that Alice and Peter were the ones with the burden of proof below. Response at 36, fn. 59 (*citing McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970)).

D. There is no clear, cogent, and convincing evidence of undue influence.

It is no wonder that Rebecca wants this Court to ignore its own standard for undue influence. She cannot identify any evidence to meet that standard. The Response does not cite to any evidence that Jack lost his free will or agency because of anything Alice or Peter did. There is no evidence that Jack was isolated by Alice or Peter.[6] There is no evidence that Jack was fearful of Alice or Peter or that they ever asked or told him to do anything.

The Response complains about the way the Opening Brief examines the evidence page-by-page and responds by speaking in generalities and by assuming that Alice or Peter directed Jack to make the changes he made to his estate planning documents. When this Court joins Alice and Peter in reviewing the record carefully, it will find a total lack of any

[6] Quite the opposite is true. Even in his last five days at home, Jack was seen in person or by Zoom by 13 people other than Alice and Peter. CP0151, 0193-0194, 0203, 0345, 0350, 0355.

clear, cogent, and convincing evidence that Alice and Peter did anything to overcome Jack's free will.

1. There is no evidence of "aggressive steps" to control Jack's assets.

The Response says on page one that Alice and Peter took "aggressive steps" to control Jack's assets. It then repeats the word "aggressive" over and over. Response at 2, 7, 9, 31. But the only acts the Response identifies as aggressive were Alice and Peter's attempts to set up a bank account that Jack could access. Response at 9 and 31. And the record shows that Jack needed access to an account because Vikki, who had been paying his bills, stopped communicating with him. CP0034, 0035, 0540, 0306, 0564.[7] There is no evidence that Alice or Peter ever exercised or attempted to exercise any control over the funds placed in that account or ever did anything aggressive *toward Jack*. Most importantly, there is no evidence that Jack

[7] Even the superior court was unimpressed by the evidence surrounding the opening of a new account, declining to find any financial exploitation. VRP 51:20-24.

was averse to having a bank account he could access but had his free will overcome by Alice and Peter.

Immediately after claiming that Alice and Peter aggressively tried to control Jack's assets, the Response identifies a November 2, 2021, email from Peter to Vikki as supposed evidence of undue influence. The Response accuses Alice and Peter of "conveniently failing to cite" the email. See Response at 32 (citing CP0645). But the Opening Brief cites that email at page 69.[8] Peter's email does not contain any evidence of any behavior by Alice or Peter to influence Jack. Instead, it recounts that Vikki took Jack from his home under false pretenses, responded to Jack's plan to leave his house to Alice by becoming very angry, told Jack she would never speak to him again, and carried out that threat. CP0034. The email also says, correctly, that this behavior is elder abuse. *See* RCW 74.34.020(2)(a)(defining elder abuse to include exactly those

[8] The citation is to CP0034, which is the same as CP0645.

behaviors displayed by Vikki in Joe's presence: threatening, punishing, and isolating the vulnerable adult).[9]

2. Alice and Peter did not influence the content of Jack's will.

The Response accuses Alice and Peter of creating a "unique version of the truth" in which they did not post Jack's request for a new attorney to a WSBA listserv. Response at 33. Alice and Peter did no such thing. The Opening Brief recites the documented facts about Alice and Peter's limited involvement with Jack's hiring of a new attorney: Peter sent a general message to a listserv, at Jack's request; Janean Kelly responded to Peter; and, at Jack's request, Peter and Alice invited Ms. Kelly to Jack's home to meet privately with Jack. Opening Brief at 22; CP0352-0353, 0502. The points that the Opening Brief makes, and the Response mischaracterizes, are

[9] As discussed in the Opening Brief, and as is evident from the plain text of the document, the superior court misread this document in finding that Peter told Vikki "being upset with Jack" is elder abuse. CP0803, Finding of Fact (FOF) 15.

that Alice and Peter did not choose their own lawyer for Jack, as Vikki and Joe did (CP0539; 0140); they did not take Jack from his home to a new lawyer, as the superior court found they did (CP0804, FOF 19); Alice and Peter did not attend Ms. Kelly's meetings with Jack (CP0142-0146 (Kelly declaration)); and Alice and Peter did not have any input on what went into the documents Ms. Kelly drafted, as Vikki and Joe did with the documents drafted by David Roberts (CP0142-0146; 0140).

While the Response characterizes accuracy about the facts surrounding the preparation of Jack's estate planning documents as "niggling" and "an egregious waste of time," (Response at 33) a close examination of a beneficiary's involvement in the preparation of estate planning documents and in the testator's decision-making is a hallmark of undue influence case law.[10] Under that case law, the facts that a

[10] The Response also takes a gratuitous swipe at the integrity of Peter Buck (a nearly 50-year member of the bar) by claiming his sworn testimony that he did not discuss Jack's estate plan with him is "highly unlikely," essentially accusing Peter of lying. Response at 29-30. The Response's speculation and disparagement is inappropriate, not relevant to this Court's analysis, and betrays

relative in a confidential relationship with the testator facilitated the act of having a will prepared and the will happened to benefit that relative, are insufficient to support a claim of undue influence. *Dean v. Jordan*, 194 Wash. 662, 79 P.2d 332 (1938); *In re Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012). On the other hand, if a beneficiary gives substantive instructions to the testator's attorney or attends the testator's meetings with the attorney, those facts can be evidence of undue influence. *In re Haviland*, 162 Wn. App. 548, 555-556, 255 P.3d 854 (2011); *In re Lint*, 135 Wn.2d at 537. Getting the facts right is important. And here, the facts are that Peter and Alice had no substantive involvement in the preparation of Jack's will or other legal documents.

This case aligns so well with the oft-cited case of *Dean v. Jordan*, that it is worth comparing the two. Orilla Dean wrote a will in 1920 that benefitted her three stepchildren. 194 Wn. at

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Respondents' knowledge that the facts in the record are insufficient to support the superior court's orders.

662-63. Jack Clearman wrote a will in 2007 that benefitted his three children equally. CP0117. In 1931, Dean's niece, Ora Graham, began taking care of her. 194 Wn. at 665. In 2015, Alice began taking care of Jack. CP0304. Dean was deeply appreciative of Graham. 194 Wn. at 666. Jack deeply appreciated Alice. CP 0142, 0343, 0348. Dean's stepchildren never lived with her. 194 Wn. at 666. Jack's other children never lived with him in his old age. CP0304. Two years after Graham began taking care of Dean, Dean wrote a new will benefitting Graham to the complete exclusion of the previous beneficiaries. 194 Wn. at 665. Six years after Alice began taking care of Jack, he amended a trust and wrote a will that ensured she would receive the house they shared, before splitting the rest of his estate between his three children. CP0113, 0222. Dean's stepchildren challenged the later will on the basis of undue influence. 194 Wn. at 662. Jack's older children are trying to use this proceeding as a short-form will contest based on alleged undue influence. In *Dean*, the claim

that Graham unduly influenced Dean was based entirely on suspicion, because there was no "positive evidence" of any act by Graham to unduly influence Dean and ample evidence of the care provided by Graham and the attachment between Graham and Dean. 194 Wn. at 673. The same is true here. There is no positive evidence of Alice or Peter asking or telling Jack to change his estate plans and there is ample evidence of Alice providing constant care to Jack and Jack appreciating it. The *Dean* Court determined that the evidence was insufficient to support a finding of undue influence. This Court should do the same.

3. There is no evidence of deception.

The Response argues that Alice or Peter "deceived Jack" because "Alice herself told Dr. Clearman that, contrary to her wishes, Buck had told Jack that Dr. Clearman wanted to sell his home and place him in a care facility, an assertion Dr.

Clearman flatly denied." Response at 30.[11] Rebecca's argument on this point requires careful, chronological, unpacking in order to avoid the same errors the superior court made.

Rebecca did express that her plan was to move Jack from his home. In early October, when Rebecca visited Poulsbo, "she made it clear when she arrived that she planned to sell the house and move Dad into an institutional care facility." CP0031. Rebecca herself "told Dad he was running out of money and it would be too expensive to keep him at home and that she was there to sell his house. Vikki said the same." CP0305 ¶ 7.

Rebecca repeated her thoughts on moving Jack from his home in an October 4, 2021, email to Alice and Peter. She wrote: "it is time to start a new phase," "Dad no longer has funds to pay for in-home care," "we must have a new long term

[11] The naming conventions in the Response are unhelpful and at times misleading. Alice Clearman, PhD, also goes by Dr. Clearman, but the Response refers only to Rebecca as Dr. Clearman. Alice Clearman is a different person than Peter Buck and does not share a name with him, but the Response refers to them collectively as "Buck." Rebecca's decision to refer to Alice and Peter collectively as "Buck" appears to be an attempt to blur the evidence because there is not enough of it to make out a case against either Alice or Peter.

plan," "Dad will do extremely well in an environment with lots more people," "it will be an adjustment for everyone; thankfully people adjust to changes, even unwanted ones," and "this is my decision to make." CP0028.

There is no evidence that Alice or Peter mischaracterized anything Rebecca said in early October. Rather, they "showed Dad the October 4 email from Rebecca." CP0031. On October 27, 2021, Alice told Vikki that she had showed Jack Rebecca's October 4 email. CP0031.

Only after Rebecca knew that Jack had seen her email did she deny an intent to move him from his home. Two days after Alice's email to Vikki, on October 29, 2021, Rebecca sent an email to Alice and Peter reframing her thoughts on Jack's living situation. CP0032. While this email claims Alice and Peter are misrepresenting her earlier statements, it does not claim they have mischaracterized anything *to Jack*.

There is no evidence that in between October 4 and October 29, Alice or Peter said anything to Jack that was

inconsistent with Rebecca's October 4 email or did anything other than show the email to him. There is also no evidence that after October 29, Alice or Peter said anything to Jack that was inconsistent with Rebecca's revisionist October 29 email.

With those facts in mind, Rebecca's argument about "deception" by Alice and Peter can be easily addressed. Her first contention is that Alice or Peter acted "contrary to [Rebecca's] wishes" by speaking to Jack about their discussions with Rebecca. Response at 30. This is irrelevant—Alice and Peter had no duty to follow Rebecca's instructions to keep Jack in the dark. Rebecca's next contention is that Alice and Peter were deceptive in telling Jack that she wanted to "sell his home and place him in a care facility." Response at 30. In fact, there is no evidence that Alice and Peter told Jack anything aside from showing him what Rebecca herself wrote on October 4, 2021. Finally, Rebecca says that Alice and Peter's statements to Jack about Rebecca's intentions were statements Rebecca "flatly denied." Response at 30. Rebecca's "denial" came in an

October 29 email, well *after* she sent, and Jack saw, her October 4 email.

Despite Rebecca's attempts to recast her own statements in 2021 and blur the timeline in her Response, the record does not contain any evidence of Peter or Alice telling Jack anything deceptive.

4. Alice and Peter did not have a burden of proof.

At footnote 59, the Response suggests that Rebecca did not have a burden of proof on the issue of undue influence because there is a presumption that Alice and Peter unduly influenced Jack. Response at 36, *citing McCutcheon v. Brownfield*, 2 Wn. App. at 356, for the idea that if a recipient of a gift is in a confidential relationship with the donor, they must rebut the presumption that the gift resulted from undue influence. *McCutcheon* does not apply for several reasons.

First, Peter did not receive a gift. When the Response claims that "Buck" received gifts from Jack, its decision to refer to Alice Clearman and Peter Buck collectively as "Buck" goes

from confusing to misleading. See Response at 36, fn. 59. The only person named Buck, Peter, received no gifts from Jack. In fact, he offered to contribute funds to increase Jack's in-home care. CP0027.

Second, *McCutcheon* does not apply to the case against Alice because it is about *inter vivos* gifts, not testamentary bequests. 2 Wn. App. at 350. An *inter vivos* gift to a person in a confidential relationship with the donor may raise a rebuttable presumption of undue influence. *In re Melter*, 167 Wn. App. at 296. But this case does not involve an *inter vivos* gift. "Unlike in the gift context, the existence of these cautionary circumstances does not shift the ultimate burden of proof" in the case of a testamentary gift. *Id.* at 298-299. Rebecca's attempt to shift the burden of proof to Alice and Peter fails.

5. The superior court's Conclusion that undue influence occurred, and its related findings, are unsupported.

There is no evidence to support Conclusions of Law 3 and 4, that Alice and Peter unduly influenced Jack by deceiving

him about Rebecca and Vikki's intentions to persuade him to change his estate plan. CP0807. The superior court's findings in support of this conclusion were not supported by clear, cogent, and convincing evidence. VRP 50, 51, FOF 10-12, 14-16, 19 (CP0801-0804).

E. The Response does not identify evidence sufficient to support a finding of a pattern of neglect or a clear and present danger.

Neglect is either (a) a pattern of conduct or inaction that fails to provide goods and services or fails to avoid or prevent pain or (b) an act that demonstrates a "serious disregard of consequences of such magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, and safety." RCW 74.34.020(16)(a and b).[12]

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[12] The Response faults the Opening Brief for citing to the discussion of the meaning of "serious disregard" in *Brown v. DSHS*, 190 Wn. App. 572, 590, 360 P.3d 875 (2015) because *Brown* was not followed in *Woldemicael v. DSHS*, 19 Wn. App. 2d 178, 494 P.3d 1100 (2021). The Court of appeals has continued to cite *Brown* in cases under RCW 74.34 since *Woldemicael*, noting that statutory language in the child neglect statute analyzed in *Brown* is "identical" to the language in RCW 74.34. *Green v. DSHS*, 2022 WL 17850725 at *4 (Wash. Ct. App. 2022)(unpublished); *Tekle v. DSHS*, 2022 WL 16780296 at *5 (Wash. Ct. App. 2022)(unpublished). In any event, while it is helpful, it is not necessary to

1. There is no evidence of a pattern of neglect.

The superior court did not find that Alice and Peter engaged in a pattern of neglect. But the Response argues that there was a pattern of neglect. In doing so, it strays from the facts in many ways.

Some of Rebecca's misstatements are small or off topic. For instance, she claims that she personally "provided medical care to [Jack] for 30 years." Response at 1, 4. There is no evidence of Rebecca personally providing medical care.

Some of Rebecca's misstatements are more material. For instance, she accuses Alice of helping Jack with toileting "until she decided to just stop." Response at 41. The undisputed evidence is that Alice stopped taking Jack to the toilet because his inability to bear weight with his painful shoulders made it dangerous. CP0587. Rebecca also claims Dr. Mendelsohn testified that "Alice took no steps to obtain medical care for

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examine *Brown* to determine that the evidence is insufficient to support a finding of neglect here.

Jack until he had to be taken to the hospital by emergency personnel." Response at 2 at 17 (CP0232). This is not true. Dr. Mendelsohn testifies that Alice scheduled a December 6, appointment. CP0231. The appointment was made before December 2. CP0186. The appointment was for the purpose of evaluating Jack for possible hospice care, *which Dr. Mendelsohn agreed should be done*. CP0231. Relatedly, Rebecca claims "Alice herself decided Jack needed hospice care." Response at 41. Not at all. Alice set up an evaluation so a decision could be made by Jack's doctor. CP0231.

Some of Rebecca's misstatements are critical. The first is Rebecca's repetition of the claim that Alice and Peter "prevented emergency medical personnel from attending to Jack." Response at 2 and 16. This was a primary basis for the January 7, 2022, order and was adopted in Finding of Fact 27 on April 26, 2022. It is telling that on this point the Response only cites an unsigned and unsworn "status report" that purports to have been written in the Poulsbo Fire Department weeks

after the fact, and not the more dramatic declarations of Joe and Rebecca—which are inconsistent with the Fire Department's records. Response at 16, citing CP0259.[13] The Fire Department's contemporaneous report and log shows that first respondents were "at patient" at 14:54:00 and closed the case seventeen minutes later at 15:10:59, saw Jack, noted: "Patient Evaluated, No Treatment/Transport Required." CP0203-0204.

Rebecca's most significant misstatements are about her own communications. Rebecca's central claim is that Alice and Peter "neglected to get [Jack] medical care for a week after Dr. Clearman insisted they do so." Response at 37 (emphasis added). Rebecca claims that she responded to the December 1, 2021, "notify the relatives" email with "desperate pleas to get him to a doctor." Response at 41. While these claims convinced the superior court and may make Rebecca feel better, they are *wrong*.

[13] The Response says "CP0295," but this appears to be an error.

The first communication from Rebecca about Jack seeing a doctor was on December 1 at 9:11 P.M. She said "I assume Alice will be taking him to see his doctor tomorrow if he's still sleepy/droopy." CP0045(Appx. 126). At that time, Jack's only symptoms were weakness and drowsiness. CP0044 (Appx. 125). The next morning, December 2, Alice reported that Jack was "a lot better," eating well, sitting up, "perky and mentally good." CP0186 (Appx. 074). In response to that report, Rebecca asked that Jack not see his doctor on Monday, December 6, for a hospice evaluation. *Id*.

There were two communications from Rebecca on December 3, 2021. Her text message to Alice did not request that Jack see a doctor. CP0192 (Appx. 082). It said "it's a relief to know that you are grateful to be there. Thanks again. R." *Id*. In response to an email from Peter that evening discussing hospice care and Jack's appointment with Dr. Mendelsohn, Rebecca wrote: "Thank you Peter. Great idea, and I appreciate

that you are willing to help. I will contact you tomorrow." CP0047 (Appx. 0128).

The first time that Rebecca mentioned checking Jack for a bladder infection was in a text message on December 4, 2021, at 5:50pm. CP0175 (Appx. 085). She proposed taking a urine sample to Dr. Mendelsohn on Monday, December 6, 2021, or maybe calling another doctor to get a sample to the lab on Sunday, December 5, 2021. *Id*. In response, Alice explained that Jack did not have the symptoms he had with a previous bladder infection. CP0176 (Appx. 086). Rebecca responded: "Great info thanks." CP0177 (Appx. 087). Later that evening, Rebecca texted "All this sounds like infection Alice. He needs medical care." CP0178(Appx. 088). Alice responded that she could prepare a urine sample the next day and Jack would see the doctor Monday, December 6. CP0184-185(Appx. 089-90). Rebecca responded "Wonderful." CP0185(Appx. 090). In the early evening of December 5, Rebecca saw Jack via Zoom and

did not mention any need for him to see a doctor right away. CP0194 (Appx. 092).

In sum, Rebecca sent a couple of texts and expressed no concern at the pace at which Alice was moving to get Jack to the doctor. Rebecca's ultimate claim that Alice and Peter "did engage in a pattern of conduct after [Rebecca] told them Jack had an infection and needed immediate medical care" is refuted by the record. Response at 37. Rebecca *never* told Alice and Peter that Jack needed *immediate* care, not even after she saw Jack by Zoom on December 5. CP0168, 0193, 0194. And Alice had Jack taken to the hospital within 28 hours of Rebecca first mentioning an infection. CP0175, CP0199.

2. Rebecca's arguments about a clear and present danger are all based on hindsight.

A finding of serious disregard of a clear and present danger cannot be based on hindsight. RCW 74.34.010; *Woldemicael*, 19 Wn. App. 2d 178, ¶ 83 (unpublished in part). The Response relies entirely on hindsight to defend the superior court's finding of neglect under RCW 74.34.020(16)(b). The

Response claims: "Had Alice obtained help for [Jack] on the first or second day he fell ill, an otherwise healthy Jack could have survived the urinary tract infection and not become septic." Response 14, citing CP0183. It is unclear what Rebecca means by "the first or second day he fell ill." If she means December 1, when Jack was drowsy, Rebecca's own contemporaneous opinion was that Jack should go to the doctor only if he remained drowsy the next day, which he did not. CP0045, 0186. If Rebecca means the first or second day that Rebecca suspected an infection, then those days are December 4 and 5, and Jack was taken to the hospital on December 5. CP0175. In any event, there is no admissible evidence that Jack's outcome would have been any different if he had arrived at the hospital earlier, or of how much earlier he would have had to arrive to have a different outcome.

Rebecca also claims that Alice and Peter "disregarded a UTI leading to sepsis, a clear and present danger to Jack." Response at 37. This is an argument from hindsight. Jack's

professional caregiver, who saw him as late as December 3, did not see symptoms of infection. CP0351. Alice did not see symptoms like Jack had with a previous bladder infection. CP0176, 0184-0185. Rebecca had a Zoom call with Jack on December 5 and did not say anything about seeing signs of a clear and present danger. Joe accompanied Jack to the toilet on December 4 and did not testify that he saw anything to indicate an infection. CP0049. Joe accompanied Jack to the toilet again on December 5 and mentioned only that Jack appeared dehydrated. CP0050. He also testified that Jack looked and felt a lot better after using the toilet and sitting up. *Id*. If neither Alice, nor Ms. Mouwdy, nor Rebecca, nor Joe saw contemporaneous signs of infection, then there is no basis to say that a danger was clear and present at any point before Alice had Jack taken to the hospital.

Lacking any evidence of a perceptible danger, Rebecca argues that Alice and Peter engaged in "serious disregard of [Rebecca's] desperate pleading" about taking Jack to the

doctor. Response at 43. First, it is legally irrelevant whether Rebecca was disregarded. Second, as discussed above, there is no evidence of desperate pleading or insisting by Rebecca. She did not come to Poulsbo or even talk to Alice on the phone. She sent a few texts and emails that did not ask for Alice or Peter to move any faster. Rebecca is only desperate in hindsight.

F. The superior court's Conclusion that neglect occurred, and its related findings, are unsupported.

There is no evidence to support Conclusion of Law 6, that Alice and Peter engaged in neglect by disregarding a clear and present danger. CP0808. The superior court's findings in support of this conclusion were not supported by clear, cogent, and convincing evidence. VRP 52-53; FOF 21, 26, 27, 30, 31 (CP0804-0806).

G. The Response's discussion of Financial Exploitation is irrelevant.

The Response argues that Alice and Peter engaged in financial exploitation. Response at 34-35. The superior court rejected this claim, and that rejection was not appealed. VRP

51:20-21. Additionally, there is no evidence that Alice or Peter used any property of Jack's for their own benefit. RCW 74.34.020(7). Instead, the evidence shows that Peter offered to pay for supplemental in-home care for Jack (CP0027), set aside his own funds in case Jack ran out of money (CP0306, 0388), and provided nightly meals for Jack (CP0372, 0381).

H. Rebecca is not entitled to a fee award, but Alice and Peter are.

Under RCW 74.34.130(7), a court is only allowed to award attorney fees or costs to a petitioner to the extent they are "necessary for the protection of the vulnerable adult." The Response does not even try to claim that the fees incurred in Rebecca's pursuit of post-death orders against Alice and Peter were necessary to protect Jack. The superior court's fee award was without legal basis and should be reversed.

Alice and Peter are entitled to an award of attorney fees. A court's equitable powers allow it to award attorney fees to a party in response to an adversary's bad faith. *Dalton M, LLC v.*

North Cascade Trustee Services, Inc. 20 Wn. App. 2d 914, 504 P.3d 834 (2022). The Response's only argument against a fee award is that the superior court did not make a finding that Rebecca pursued this case for an improper purpose. Response at 49. But that is why Alice and Peter have appealed—the superior court erred. It failed to recognize that this case was moot and thus never reached the issue of Rebecca's improper purpose in maintaining a moot action.

Rebecca's maintenance of this action after it was moot was part of a concerted campaign of bad faith attacks on Alice and Peter by Rebecca, Vikki, and Joe Clearman, which included misstatements to a 911 operator and in testimony (CP0019, 0215, 0220); vandalizing Alice's home (CP0481); calling Animal Control to impound Alice's cats and place them up for adoption (CP0298, 0300-0301); and using the control over Alice's home granted to them in the TRO to attempt to extort concessions from Alice in the probate of Jack's estate. CP0277, 0283, 0288, 0292, 0490. The Response does not attempt to

justify these behaviors. An award of fees to Alice and Peter would be just and equitable.

III. CONCLUSION

Alice and Peter respectfully request that this Court vacate the superior court's January 7 and April 26 orders as moot or, in the alternative, reverse the conclusions in those orders that Alice and Peter engaged in undue influence and neglect as unsupported by the evidence.

This document contains 7,124, excluding the parts of the document exempted from the word count by RAP 18.17. This Court set a limit of 7,500 words for this document in an August 10, 2022, Order.

DATED January 27, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On this date, I caused a true and correct copy of the foregoing Appellants' Opening Brief to be served on the following in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of January, 2023, at Seattle, Washington.

s/ Wen Cruz
Wen Cruz

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